STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(WILLIAM C. WHITBECK, P.J., JOEL P. HOEKSTRA and DONALD S. OWENS, J.J.)
AND THE COURT OF CLAIMS

ANN E. MASKERY and
ROBERT MASKERY,

Plaintiffs-Appellees,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendant-Appellant.

S.C. NO: 121338

C.A. NO: 187738

L.A. NO: 94-15604-CM (now MH)

BRIEF ON APPEAL OF DEFENDANT-APPELLANT BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION

This matter is pending before this Court on Defendant-Appellant's Application for Leave to Appeal the decision of the Court of Appeals dated January 11, 2002. By Order dated October 22, 2002 this Court granted that Application for Leave to Appeal.

STATEMENT OF QUESTION PRESENTED

UNDER A NARROW CONSTRUCTION OF EXCEPTIONS TO GOVERNMENTAL IMMUNITY, IS A RESIDENCE HALL, WHICH IS LOCKED 24 HOURS PER DAY AND OPEN ONLY TO ITS RESIDENTS ON THE BASIS OF KEY ACCESS, A BUILDING "OPEN FOR USE BY MEMBERS OF THE PUBLIC" WITHIN THE MEANING OF MCLA 691.1406; MSA 3.996(106)?

The Court of Claims by its decision said "No".

The Court of Appeals, on delayed appeal from the Court of Claims, issued a decision on February 10, 1997, in which it said "No".

The Court of Appeals, on remand to consider the case in light of Horace v. City of Pontiac, issued a decision on March 24, 2000, in which it said "No".

The Court of Appeals, on remand to consider the case in light of Brown v. Genesee County, and without further briefing of the parties, on January 11, 2002, issued a decision in which it said "Yes".

Defendant-Appellant contends the answer should be "No".

Plaintiffs-Appellees contend the answer should be "Yes".

STATEMENT OF FACTS

A. STATEMENT OF MATERIAL FACTS

On December 19, 1992, Plaintiff-Appellee Ann Maskery was on the campus of the University of Michigan in Ann Arbor at the Betsy Barbour Residence Hall. (Complaint, Paragraph 8, Appendix page 15a) It is believed that she was there for the purposes of visiting her daughter who was then living at the Betsy Barbour Residence Hall. (Lease Agreement, Appendix page 30a)

Plaintiff-Appellee Ann Maskery attempted to utilize a courtesy phone at the Betsy Barbour Residence Hall. (Complaint, Paragraph 8, Appendix page 15a) The courtesy phone was located on the outside of the Betsy Barbour Residence Hall. (Photographs, Appendix page 33a)[1] This phone provided the only means by which outsiders could contact residents because the Residence Hall was locked at all times.

In a complaint dated December 9, 1994, Plaintiff-Appellee Ann Maskery alleged that she lost her balance on the steps to the Residence Hall, fell and sustained a fracture to her left wrist. (Complaint, Paragraphs 8 and 14, Appendix page 15a and 16a) Plaintiffs-Appellees also alleged that the injuries sustained were actionable under the public building exception to governmental immunity. MCLA 691.1406; MSA 3.996(106).[2] By reference to the public building exception the Plaintiff-Appellees have implicitly argued that the

[1] As can be seen from the photographs, the Betsy Barbour Residence Hall retained its characteristics of an old refurbished home and provided restricted access housing for a small number of female University of Michigan students.

[2] Although Plaintiffs' Complaint actually references MCLA 691.1407, the text of the allegation references the public building exception to governmental immunity. Complaint, Paragraph 6, Appendix page 15a.

Residence Hall was a public building which was "open for use by members of the public" within the meaning of that section of the statute.

In response, Defendant-Appellant argued that the Betsy Barbour Residence Hall, although publicly owned and operated, was not "open for use by members of the public". The Betsy Barbour Residence Hall is a facility which at all times pertinent to the facts of this matter was locked 24 hours per day. (Affidavit of Mims-Hickman, Appendix page 31a) The female students who were residents at the Hall could gain access through a key which was provided to them. (Affidavit of Mims-Hickman, Appendix page 31a) The only other means of entry would be to use the courtesy phone on the outside of the building to contact someone on the inside who could then provide them access. (Affidavit of Mims-Hickman, Appendix page 31a)

B. STATEMENT OF MATERIAL PROCEEDINGS

On April 27, 1995, Defendant-Appellant filed its Motion for Summary Disposition pursuant to MCR 2.116(C)(7) contending that the claims of Plaintiffs-Appellees were barred by immunity granted by law. Defendant-Appellant argued that the Betsy Barbour Residence Hall was not "open for use by members of the public" within the meaning of the statute and as supported by the Affidavit testimony of Ms. Mims-Hickman. Plaintiff did not request any additional discovery and instead opposed the motion solely on the basis of a counter affidavit of Susan Maskery.

The Court of Claims granted Defendant-Appellant's Motion for Summary Disposition based upon its determination that although the Residence Hall was publicly owned, it was nonetheless not a building open to the public within the meaning of the

governmental immunity statute. An Order for Summary Judgment reflecting this decision was issued on June 16, 1995. (Court of Claims Order dated June 16, 1995, Appendix page 51a)

On July 6, 1995, Plaintiffs-Appellees appealed this decision to the Court of Appeals. On February 10, 1997, the Court of Appeals affirmed the decision of the Court of Claims, citing with authority its decisions in the matters of Griffin v. Detroit, 178 Mich App 302; 443 NW2d 406 (1989) and White v. City of Detroit,189 Mich App 526; 473 NW2d 702 (1991). (Court of Appeals Order dated February 10, 1997, Appendix page 52a)

On April 7, 1997, Plaintiffs-Appellees filed a delayed Application for Leave to Appeal with this Court. In lieu of granting that Application, on February 2, 1999, the Supreme Court remanded this matter to the Court of Appeals for reconsideration in light of Horace v. City of Pontiac, 456 Mich 744; 575 NW2d 762 (1998). (Supreme Court Order of Remand and Consolidation dated February 2, 1999, Appendix page 53a) Also at that time, this case was consolidated with two other matters for the purposes of the filing of briefs and the presenting of oral arguments. On March 4, 1999, the Court of Appeals directed the filing of briefs in the consolidated cases. (Court of Appeals Order directing the filing of Briefs dated March 4, 1999, Appendix page 54a) On May 18, 1999, a Motion for Leave to file a Brief Amicus Curiae was filed by a number of other state universities and on June 9, 1999, the Court of Appeals granted that request. (Court of Appeals Order granting leave to file Amicus Brief dated June 9, 1999, Apendix page 55a) On June 9, 1999, the Court of Appeals granted the Motion to file an Amicus Curia Brief on behalf of Eastern Michigan University, Oakland University, Ferris State University, Saginaw Valley State University and Western Michigan University.

On March 24, 2000, the Court of Appeals issued its decision in the consolidated matters. (Court of Appeals Opinion dated March 24, 2000, Appendix page 56a) It affirmed the Court of Claim's Order for Summary Disposition in favor of the Defendant-Appellant on the grounds that the facts presented were indistinguishable from the privately occupied housing in Griffin, supra and White, supra. Plaintiffs-Appellees then sought leave to Appeal with this Court by way of Application on April 14, 2000. On November 21, 2000, the Supreme Court issued an Order holding the matter in abeyance pending its decision in Brown v. Genesee County Board of Commissioners, 464 Mich 430; 628 NW2d 471 (2001). (Supreme Court Order holding matter in abeyance dated November 21, 2000, Appendix page 65a) With the issuance of that decision on October 30, 2001, this Court on October 30, 2001, remanded the matter back to the Court of Appeals for reconsideration in view of the Brown decision. (Supreme Court of Remand dated October 30, 2001, Appendix page 66a)

On January 11, 2002, without any additional briefing or submissions from either of the parties, the Court of Appeals issued its decision in which it reversed its two earlier decisions. (Court of Appeals Opinon on Remand dated January 11, 2002, Appendix page 67a) The Court of Appeals held that the Betsy Barbour Residence Hall was indeed "open for use by members of the public" and, therefore, subject to the public building exception of governmental immunity.

On January 30, 2002, Defendant-Appellant filed a Motion for Re-hearing of that decision. On February 28, 2002, the Court of Appeals denied that Motion. (Court of Appeals decision dated February 28, 2002, Appendix page 72a) Defendant-Appellant then

filed a Delayed Application for Leave to Appeal with this Court.[3] On June 26, 2002, several additional parties filed a Motion for Leave to File a Brief Amicus Curiae. The amicus parties were Eastern Michigan University, Oakland University, Ferris State University and Michigan Technological University.

On October 22, 2002, this Court granted the Motion for Leave to file the Brief Amici Curiae. (Supreme Court Order granting leave dated October 22, 2002, Appendix page 73a) It also granted the delayed application for Leave to Appeal but limited the appeal to the question of whether the dormitory at which Plaintiff was injured is "open for use by members of the public" within the meaning of MCL 691.1406.

[3] The Court of Appeals records reflect that a copy of its decision of February 28, 2002 was mailed to counsel for Defendant-Appellant. Defense counsel did not, however, receive that decision and only became aware of it on March 26, 2002. On April 12, 2002 Defendant-Appellant filed a Delayed Application for Leave to Appeal with this Court, within 21 days of defense counsel's actual notice of the Court of Appeals decision.

ARGUMENT

UNDER A NARROW CONSTRUCTION OF EXCEPTIONS TO GOVERNMENTAL IMMUNITY A RESIDENCE HALL WHERE (1) NEITHER THE OCCUPANTS OR NONOCCUPANTS WOULD HAVE ANY REASONABLE EXPECTATION THAT UNINVITED PERSONS WOULD HAVE ACCESS, (2) TO WHICH EVEN THE RESIDENTS CAN ENTER ONLY THROUGH THE USE OF A KEY AND (3) WHICH SERVES A SINGLE UNIFIED FUNCTION OF PROVIDING RESIDENCE FOR UNIVERSITY STUDENTS, IS NOT A BUILDING "OPEN FOR USE BY MEMBERS OF THE PUBLIC" WITHIN THE MEANING OF MCLA 691. 1406; MSA 3.996 (106)

A. STATEMENT OF THE STANDARD OF REVIEW

The grant or denial or denial of a Motion for Summary Disposition is reviewed by this Court de novo. Groncki v. Detroit Edison Company, 453 Mich 654; 557 NW2d 289 (1986); Henderson v. State Farm Fire & Casualty Company, 460 Mich 348; 596 NW2d 190 (1999). The Court will review the record below, including the pleadings, affidavits, depositions, admissions or documentary evidence, in order to determine whether the prevailing party was entitled to the judgment it received in the lower court as a matter of law. Adkins v. Thomas Solvent Company, 440 Mich 293; 487 NW2d 715 (1992); Sewell v. Southfield Public Schools, 446 Mich 670; 576 NW2d 153 (1998).

B. EXCEPTIONS TO GOVERNMENTAL IMMUNITY ARE NARROWLY CONSTRUED.

Under Ross v. Consumers Power Company (on rehearing), 420 Mich 567; 363 NW2d 641 (1984) and the long line of cases which have followed it, exceptions to governmental immunity are narrowly construed. Consistent with this, the Court in Mack v. City of Detroit, 467 Mich 186; 649 NW2d 47 (2002) stated:

> "Accordingly, a governmental agency is immune unless the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government."
>
> At 195.

Mack emphasized that immunity was a characteristic of government and would be lost only when very specific circumstances could be satisfied. The Court stated:

> "The presumption is, therefore, that a governmental agency *is* immune and can only be subject to suit if a plaintiffs case falls within a statutory exception. As such, it is the responsibility of the parties seeking to impose liability on a governmental agency to demonstrate that its case falls within one of the exceptions."
>
> At 201.

As such, immunity will be lost only under the very specific circumstances provided for by the statute and only where the Plaintiff has satisfied the burden of proving that those circumstances exist in the case they have brought.

In the remand order of October 22, 2002, this Court narrowly defined the issue for review to whether the Betsy Barbour Residence Hall is a building "open for use by members of the public" within the meaning the governmental immunity statute. The order reflects the language of the applicable statutory exception.

MCLA 691.1406; MSA 3.996(106) contains the limited exception to governmental immunity for public buildings. It states in pertinent part:

> "Governmental agencies have the obligation to repair and maintain public buildings under their control when *open for use by members of the public.*" (emphasis added)

The statute contains further limitations on this exception to governmental immunity which are not the subject of this appeal.

C. PRIOR DECISIONS ADDRESSING WHEN PUBLIC BUILDINGS ARE "OPEN FOR USE BY MEMBERS OF THE PUBLIC".

On several occasions in the past, this Court and the Court of Appeals have had an opportunity to address when a public building will deemed "open for use by members of the public" within the meaning of the statute. Analyzing these prior decisions reveals that the Appellate Courts have noted factors which are significant for the ultimate determination of this question.

1. Publicly owned apartments are not "open for use by members of the public".

On two occasions the Court of Appeals addressed this issue in cases which involved government owned public housing units. In Griffin v. Detroit, 178 Mich App 302; 443 NW2d 406 (1989) Plaintiff's decedent had drowned in the tub of her city-owned apartment. In White v. City of Detroit, 189 Mich App 526; 473 NW2d 702 (1991) the Plaintiff claimed he had been injured in the patio area of a publicly owned apartment facility.

In Griffin, the claim for damages due to injuries related to the tub was rejected by the Court of Appeals. In concluding that the building did not come within the purview of the statute, the Court of Appeals in Griffin first noted that while the building was owned and operated by the City as a low income housing project and that it may have benefited the community as a whole, this without more did not render the building "open for use by members of the public" or to be used for a public purpose. The Court of Appeals instead concluded that the dwelling unit was used "by the decedent as her private residence under the lease agreement". Id. at p 306. As such it was not "open for use by members of the public" within the meaning of the exception.

Similarly in White, the Court of Appeals rejected a claim for injuries related to a patio which was part of a low income housing complex. Id. at page 529. The residential complex consisted of private housing units. It "was not a building open for public offices or for a public purpose". Id. at 529. The Court of Appeals therefore concluded that as a matter of law the facility was not a "public building" within the meaning of the statute. It pointed out that the mere fact that the patio was outside the building did not have any legal effect on the determination. See id. at page 529, fn. 1.

2. Public buildings closed to **all** except authorized persons are not "open for use by members of the public".

The Court of Appeals addressed the issue of openness from a different perspective in Dudek v. Michigan, 152 Mich App 81; 393 NW2d 572 (1986). In Dudek, the plaintiff was a construction worker who was injured while working on a construction project at a mental health facility. At the time of the claimed injury, the building, including the entire area of construction, had been closed off by a six foot high chain link fence and access in and out of the building and construction zone was limited to authorized personnel only at specified gates. The Court of Appeals refused to allow a loss of immunity under these circumstances noting with significance that the entire construction area had been closed to the public. It specially noted that signs had been placed at the gates warning the public that the area was not open.

Some ten years later the Court of Appeals addressed a similar situation in Steele v. Department of Corrections, 215 Mich App 710; 546 NW2d 725 (1996). The Steele plaintiff was a prison inmate who claimed injuries while working on a construction crew which was renovating a state building at a correctional facility. The building in Steele remained

closed during the period of renovations. The Court of Appeals found the exception did not apply to buildings that are specifically closed to members of the public.

Unlike the construction cases, there may be public buildings which provide important public purposes, but are nonetheless deliberately closed to the public for reasons of safety. For example, the electrical substation in Taylor v. Detroit, 182 Mich App 583; 452 NW2d 826 (1989) clearly provided an important public purpose when that building was in use, namely to provide electrical services. But, it also was a building where no public business was transacted, no public discourse took place and no unidentified, uninvited member of the public was allowed. Similarly, the government agency had a legitimate interest in foreclosing the public from entry to that building due to the very dangerous nature of electricity and its concern over public safety.

3. Public buildings with a single function, with access by unidentified persons to significant parts of building, are "open for use by members of the public".

This Court for its part addressed this issue of "open for use by members of the public" in two recent cases. In Kerbersky v. Northern Michigan University, 458 Mich 525; 582 NW2d 828 (1998) a construction worker was injured when he fell from the ladder on the roof of the Northern Michigan University administration building. The defendant had moved for summary disposition, arguing that the claim was barred by governmental immunity on the grounds that the roof of the building where the plaintiff had fallen was not open to the public.

In rejecting this claim this Court noted with significance that the administration building in question had remained open to members of the public during the construction renovations. The Court acknowledged that the public building exception did not apply to all public buildings, but was limited to those which were open for use by members of the

public. The fact that the plaintiff in Kerbersky was injured in an area of the building not open for use by members of the general public was not dispositive of the plaintiff's claims. So long as the building itself was open to the public, the plaintiff's claim would not be barred on the grounds that the injury occurred in an area of the building that was not generally accessible to the public.

After the issuance of Kerbersky the Court again considered this question in Brown v. Genesee County Board of Commissioners, (after remand) 464 Mich 430; 628 NW2d 471 (2001). Here, this Court reviewed the claims of a jail inmate who alleged that he had been injured in the jail shower. Although this Court ultimately rejected these claims on the grounds that the plaintiff was not a member of the public, the issue of the openness of the jail building was also discussed. This Court found that the shower where the plaintiff had sustained his injury was not open to the members of the public, but as in Kerbersky, determined that this fact was not dispositive of the case.

Applying the public building exception to the jail, this Court considered the public's access to the building as a whole rather than to the specific site within the building where the injury occurred. This Court again acknowledged as a preliminary matter that there are public buildings not open to the public under the statute. The Court cited Griffin and its city owned apartment building with approval as an example of this type of building.

The Court noted that it was not necessary that the building be open to the "general" public, but that it must be open to some members of the public. Thus, while access to the jail was limited it was nonetheless open to the public. Specifically, the Court noted that families, friends and attorneys could visit inmates. Other members of the public likewise could freely enter the jail for business reasons. For these reasons, the jail was deemed

"open for use by members of the public" within the meaning of the statute. See also, Bush v. Oscoda Area Schools, 405 Mich App 716; 275 NW2d 268 (1979) as an example of a building open for use by members of the public when the public has significant access to some, but not all, portions of a single function building.

D. THE MOST RECENT DECISION OF THE COURT OF APPEALS FAILS TO CONSIDER THE FACTORS OUTLINED IN PRIOR APPELLATE DECISIONS AND IS THEREFORE INCORRECT.

In its decision of January 11, 2002 the Court of Appeals, pursuant to this Court's Order of Remand, reconsidered its prior ruling that the Betsy Barbour Residence Hall was not open to the public. The Court began its analysis by repeating the general standard in Kerbersky which held that mere public ownership of a structure would not satisfy the requirements of the statute. For immunity to be lost, and the statute to apply, the building must not only be publicly owned, but must be "open for use by members of the public".

Mindful of the terms of the Order of Remand, the Court of Appeals then considered the instant case in light of this Court's decision in Brown. The Court of Appeals stated:

> "Indeed, we would suspect that there is more, or at least equal ingress and egress in a residence hall than in a jail. Similarly a residence hall is likely to receive deliveries of supply, meal and food by nonresidents. Moreover, if the very limited access to a jail is not sufficient to preclude it's characterization to a public building, the instant residence halls minimal security measures while presumably effective, further justify a finding that the residence hall was a public building". (Emphasis added) (Appendix, page 70a)

The Court of Appeals reached this conclusion without any additional briefing from the parties, on the limited record which was before it, and based upon it's supposition of the facts. The Court of Appeals failed to recognize that Brown was found to be a building

open for use by members of the public based on an analysis of the unrestricted area, not the lockdown area for its inmates.

Under the unusual new test described by the Court of Appeals, the private residences of White and Griffin are public buildings. Each "is likely to receive deliveries". Each may have a pizza delivered to the home. If the lease holder in White or Griffin were elderly, perhaps meals and food would be delivered by non-residents for a 'meals-on-wheels' program.

The Court of Appeals' new test swallows the protections provided in Dudek and Steele, construction sites, because each is "likely to receive deliveries of supplies". Undoubtedly, the security measures at the construction sites, while presumably effective, were less effective than the restricted portion of the jail where inmates were confined.

In short, the new Court of Appeals test is no test at all. Its rule encompasses virtually any publicly owned building with the limited exception of buildings where human beings are seldom allowed, such as the electrical substation in Taylor.

This decision of the Court of Appeals is clearly inconsistent with a narrow reading of the public building section. Since the issuance of Ross, this Court has consistently reiterated the principle that the grant of immunity is broad and the exceptions to immunity are narrow.

This failure to consider White and Griffin is particularly troubling given the approval this Court gave to those decisions. This Court specifically referenced the Griffin case as standing for the proposition that a residence was for the use of the tenant and was

not open for use by members of the public. In spite of this endorsement, the Court of Appeals made no mention of the case at all.

Finally, this decision of the Court of Appeals does not fit within the pattern and framework of prior case law. No consideration was given to the expectations of the public relative to their rights of access to the building. No consideration was given to the issues of the rights of privacy of the building occupants. This is particular error given the decision in Griffin as endorsed in Kerbersky which noted that such leaseholds were for the private use of the residents. Finally, no consideration was given to the fact that this very private use was the only use to which the building was put. For all these reasons, the Court of Appeals' conclusion that the Betsy Barbour Residence Hall was open for use by members of the public is in error and should be reversed.

E. A PROPOSED ANALYSIS TO DETERMINE WHEN A BUILDING IS "OPEN FOR USE BY MEMBERS OF THE PUBLIC".

The appellate courts of this state have answered the question on a case by case basis, of when a building will be "open for use by members of the public" within the meaning of the statute. They have done so without an articulated methodology to serve as a guide for considering when and how other public buildings will be deemed "open".

In their analysis, this Court and the Court of Appeals implicitly recognized characteristics of buildings which were outside the purview of the statute. There are at least three different characteristics of public buildings that distinguish the buildings as

"open" or not open to "members of the public". These are:

1. Are there reasonable expectations of free access by unidentified persons to the building in question?[4]

2. Are there reasonable expectations of the owners and occupants of the building that unidentified persons will not be free to roam some portion or all of the premises?

3. Is the building of a nature or being utilized in such a way as to provide face to face services to the public or is being used for public discourse?[5]

Absent an overall methodology, the focus and discussion in prior cases was narrow. As a consequence it was difficult for lower courts and practitioners to develop a common understanding of the relevant test. By recognizing these characteristics, a more comprehensive methodology can be described to objectively identify when a building will be open to members of the public. The suggested methodology examines three areas: (1) reasonable objective expectations of the public; (2) reasonable objective expectations of

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[4] The case here presents circumstances in which the building was completely closed off to the public and served a single function of providing residence housing to University students. There may be other cases in the future where the circumstances will not be so clear. For example, a building such as the Betsy Barbour Residence Hall instead of its exterior courtesy phone may have had a small interior three by three foot lobby in which the phone was located. Would such a building be deemed "open for use by members of the public" given the very limited access? In the alternative, is a more appropriate question whether the governmental agency allows unidentified persons free entrance to significant portions of the building? Defendant-Appellant recognizes that neither question is presented here, but believes being mindful of such situations will be helpful to articulating a meaningful and flexible method of analysis in the future.

[5] Cases which have been decided to date have involved public buildings of a single, unified purpose. It is certainly conceivable, however, that multi purpose public buildings may exist. Consideration of these hybrid structures is appropriate if the Courts are to remain flexible in application of any framework developed. This measure of flexibility is desirable in an environment where there are ongoing changes relative to how governmental agencies can hold property and how they may utilize the property they own. For example, upon passage of this governmental immunity exception in 1964, government ownership of property remained in rather traditional forms. Since then, land use and development has evolved as can be seen in the Michigan Subdivision Control Act of 1967, MCLA 560.101 et seq., MSA 26.430(101) et seq., the Planned Unit Development Act of 1978, MCLA 125.216d, .286d, .584c; MSA 5.296(16d), .2963(16d), .2934(3) and the Condominium Act, MCLA 559.101 et seq.; MSA 26.50(101) et seq. Given these legal developments, governments now own property in less traditional ways. Similarly, cost constraints or innovative architecture may result in the creation and use of hybrid buildings. One could easily imagine such structures. Examples are a building with public offices on a main floor and housing units on the floors above or a building consisting of two condominium units, one governmentally owned and the second privately owned. Any standard adopted by this Court should allow flexibility which would take into account this change in nature of property ownership and the creative ways in which buildings may be built and used.

the occupants; and (3) actual use of the building for face to face public business or discourse.

These characteristics are discussed below.

1. Expectations of the public.

The first level of analysis is to consider the access members of the public have relative to the building in question. The analysis would take into account the reasonable expectation of members of the public of their right to enter. That reasonable expectation would be based upon an objective belief that the building in question was one in which citizens with legitimate public interests or public business would be able to engage in discourse or complete transactions. It is an expectation that the government has made the building suitably safe for the business of the public at large.

The Court could pose the question in such a way as to ask whether a reasonable persons would have a legitimate basis for believing that they had a right of entry to the building in question and had a reasonable public interest in obtaining access. Indicators would include signage, locks, fencing, guards or other indicia that would allow an objective analysis of an expectation of free entry.

There are additional public policy considerations. Certainly issues of public safety would be of paramount concern. Governmental agencies would legitimately wish to keep members of the public from areas which they deemed unsafe. Secondly, the statute does provide that governmental agencies have an obligation to protect the public in buildings which are open from dangerous or defective conditions. A governmental agency who was aware of such a dangerous or defective condition has the opportunity to close that structure to the public and in this way avoid liability under the statute.

2. Expectations of the occupants.

The second factor for the Court to consider would be the reasonable expectations of the owners or occupants of the building relative to the access by members of the public.

The reasonable expectations of those individuals who occupy or have specially authorized access to the building is also important. Here, the Court would focus on the owner and/or the occupants of the building. Under this factor, the inquiry would be whether the owner or occupier of the building had in any way demonstrated an intention that the public was welcome to this building or had manifested to members of the public that public business could be conducted there. Perhaps most simply put, the question to ask is whether or not the owner or occupant of the building had placed a welcome mat in front of the building and indicated that the public was welcome. As with the expectations of the public, indicators would include signage, locks, fencing, guards, formal leases or other indicia that would allow an objective analysis of an expectation of privacy.

3. Use of building for face to face public business or discourse.

A third indicator is the nature or use to which the building is put. The courts would examine if the function of the building serves a public or private purpose. Described differently; is the building serving some generalized public purpose such as a forum for public business or discourse. Unless it is serving such a function, the building would not be considered "open for use by members of the public".

That the building is open for face to face use by members of the public asks the question of whether the governmental agency is conducting a business in the building for which the public would have a public reason to participate in person. Indicators of this would include all of the following factors: public purpose, public interest and the physical

appearance of members of the public as being either necessary or anticipated. In Kerbersky, the administration building was a forum for persons needing to conduct business with or obtain information from the University. As such, it had public purpose, and the physical appearance of the interested public was certainly anticipated. In contrast, there may be buildings where public business is conducted, but the public has no access or face to face contact, as all business is conducted via telephone or computer. In such a place, the face to face appearance of the public is neither necessary nor anticipated. Other examples of such buildings might include facilities conducting restricted research; the public may have a legitimate reason to make contact with the official inside, but are barred from face to face access.

Similarly, in Taylor, the electrical substation satisfied the public purpose of providing electricity. Persons may have been interested in seeing the facility, but had no public need to do so and were barred from physical entry. Likewise, the apartments in White and Griffin also served a public housing purpose, but did not provide a forum for the public to conduct public business. Although not all individuals were barred from entry (tenants could certainly invite guests) there was no public reason or need for access. Persons who entered would do so for no government or public reason, but for private reasons.

F. APPLICATION OF THE PROPOSED METHODOLOGY TO EXISTING PRECEDENT YIELDS CONSISTENT RESULTS.

The methodology described above brings within one framework the cases in which this Court and the Court of Appeals have addressed the issue of when a building is "open for use by members of the public". In every reported case, one or more of the proposed

factors were undisputed and thus, not a subject of extensive discourse. However, when a factor was disputed, the methodology would produce the same holding.

For example, in both Dudek, supra, and Steele, supra, the areas in which the plaintiffs were injured were closed off from public access. In Dudek in particular the construction area was limited by a six foot chain link fence at its perimeter. When faced with such an obstacle, a reasonable public observer would conclude that they were not welcome in the area behind the barrier.

Dudek and Steele likewise fit the second inquiry proposed by Defendant-Appellant which relates to the reasonable expectations of the owner or occupant of the building. By shutting the building to all but authorized personnel, by limiting even that access to a specified gate, by placing fences or otherwise limiting access to the area and even placing notices concerning the limited entry, the governmental entity has made manisfestly clear its intention that the public was not welcome to these areas and that they should not be deemed open to the public. The governmental agency could hardly do more to express their intention that the public was not welcome.

The third inquiry is likewise met in these two cases. A building which is under construction is at that point serving no public function and is not one to which a member of the public would generally be admitted for purposes of transacting any governmental or public business. During the period of the construction the building is simply not serving any purpose for which members of the public should be present.

The result reached in Taylor, supra would also be explained and justified by use of the inquiries suggested. The reasonable expectation of the public upon seeing such a locked and barred electrical substation would certainly be to conclude that this was not a

structure they were intended to enter or to which they were welcome. Secondly, the limited access and locked door put in place by the owner of the building clearly manifested their intent and expectation that access to the public was restricted if not barred. Further, the nature of the building in providing electricity, while a comendable governmental function, is not one to which the public would ordinarily be privy due to issues of public safety.

A similar conclusion would also result in applying the standard to both the decisions in White, supra and Griffin, supra. In both instances there could be no reasonable expectation by a member of the public that they would have a right to enter a private residence. In the same regard, the residents and occupants of those private apartments would have a reasonable expectation to privacy and security and to be free from the public having access to their homes. The residents had leases which provided an objectively reasonable basis to expect privacy. While the act of the government in building such a residence may serve a larger public interest, the specific purpose of such structures is to provide homes rather than to create a forum for the public. The mere fact that a building is publicly owned does not mean that it is open for use by members of the public.

This methodology is also consistent with this Court's most recent pronouncements concerning the public building exception. In Kerbersky, supra this Court noted as a preliminary matter that the public building exception did not apply to all public buildings. Rather, the statute specifically deliniated qualifying language which restricted the application to public buildings that are open to use by members of the public. In making this distinction, this Court in Kerbersky noted a difference between buildings owned by governmental agencies and "public buildings". The Kerbersky Court noted that the

administration building remained open to members of the public during the period of time that the construction was conducted. Implicitly, the public had a reasonable expectation they would be allowed the right of entry. Further, by keeping the building open for business during the construction, the governmental agency likewise intended that the public would still be allowed entry into the administration building. Finally, the administration building is of a type that one would generally expect the public to be admitted. Educators, staff and students as well as visitors to the University would all have legitimate reasons for entering the building and conducting public business there.

The methodology is also consistent with Brown, supra. The Plaintiff in Brown was a jail inmate who was injured when he slipped in water near the jail shower stall. A plurality of this Court ultimately rejected the claim on the grounds that the Plaintiff was not a member of the public. However, before doing so, this Court held that the jail was a public building open for use by members of the public. It acknowledged that access to the jail might be limited, but nonetheless found it was in fact open to members of the public.

Under the methodology, members of the public, while perhaps not expecting to be able to enter all portions of a prison, would nonetheless have a reasonable expectation they could enter at least significant portions of the facility. As the Brown Court noted, this may include friends and family on social visits as well as attorneys and other persons having business to conduct within the facility.

As for the second inquiry, the governmental entity operating the jail expects the facility to be secure but does not expect it to necessarily be free from visits by members of the public. Again, as the prisoners are being held under compulsion, the only way they can have social visitors or to transact business is through the leave of the prison facility.

Thus, while it is certainly a facility of limited access it is not one to which access is denied by the governmental agency. In any case, the jail residents are not in an analogous situation to the tenants of the City housing facilities in Griffin and White. Unlike those tenants who hold those lease holds with expectations of security and privacy, the prisoners are held under very different circumstances. Prisoners have no reasonable objective expectation of privacy. In a jail, their day to day existence is strictly controlled and supervised by the governmental agency.

The proposed methodology is both succient and flexible. It would provide this Court and practitioners with a meaningful guide to determine when a building is indeed "open for use by members of the public".

G. APPLICATION OF THE PROPOSED METHODOLOGY TO THE BETSY BARBOUR RESIDENCE HALL.

There is no dispute that the Residence Hall is a public building. It is owned and operated by the University of Michigan, a governmental entity. What Defendant-Appellant does dispute, however, is any claim that this building is "open for use by members of the public".

1. Plaintiffs have no evidence to show that unidentified persons conduct public business or public discourse inside the Betsy Barber Residence Hall or have any reasonable expectation of doing so.

It was uncontested that all portions of the Betsy Barbour Residence Hall were locked around the clock. Also undisputed was the fact that the female residents of the Betsy Barbour Residence Hall gained access to the building through keys which were issued to them. Anyone else seeking access to the building could do so only through the permission of a resident. (See Affidavit of Mims-Hick, appendix page 31a.)

Any non-resident wishing to obtain access to the building would need to use a courtesy phone on the outside of the building for this purpose. Through the use of the phone they could then call a resident to request permission. The resident would then open the locked door and allow them to enter. It was this courtesy phone which Plaintiff-Appellee Ann Maskery was using on the date of her claimed injury. As she was unable to freely enter the building to see her daughter, it was necessary for her to use the phone to contact her daughter within.

Members of the public ordinarily could not have a reasonable expectation that they would be allowed to enter the living quarters of another individual without invitation. This is certainly true whether the building is publicly or privately owned. In the case of the Betsy Barbour Residence Hall, this element of privacy and lack of access would be reinforced in the mind of a reasonable person by virtue of the fact that the building was locked and access could be gained only through the use of the exterior courtesy phone and by obtaining the permission of someone within the building.

Based upon these facts, it is clear that access to the Residence Hall was highly controlled and restricted. Accordingly, no reasonable person could have a legitimate expectation that as a member of the public they would have a right to freely enter the building or would have any legitimate public reason for doing so.

2. Plaintiffs have no evidence to show that occupants of the Betsy Barber Residence Hall should expect unidentified persons roaming inside the building.

The young women who were living in the Residence Hall would likewise have an expectation that the public would not be allowed to freely enter the building. The uncontested facts show that the Residence Hall was a living facility for female students at the University of Michigan. They had leases. It was their private residence, their "home

away from home", so to speak. The young women who lived in this facility were entitled to use it in the same way tenants in an apartment building would expect to use their leaseholds. The young women living there certainly had a reasonable expectation that they would be free from intrusions from the public into their private residences. Again, the locked door and the courtesy phone manifest that this is a private place rather than a public one and that the tenants within had a reasonable expectation of security and privacy.

3. Plaintiffs have no evidence to show that the Betsy Barber Residence Hall provides a location for general public business transactions or other general public discourse functions.

By virtue of the fact that the Residence Hall was a dormitory and served no other purpose meets the third factor of the proposed test. That is, as the building did serve as a residence it really did not serve any day to day public need or function in any way as a public forum.

CONCLUSION

The methodology set forth here has been shown to be consistent with all of the cases in which the appellate courts of this state have addressed the issue of when a building is "open for use by member of the public". Similarly, the methodology demonstrates the error in the decision of the Court of Appeals which found the Betsy Barbour Residence Hall to be open for use by members of the public.

Perhaps most importantly, however, is the approval which this Court in Kerbersky gave to the earlier decisions relative to this issue and which Defendant-Appellant has demonstrated fit within the framework. This Court adopted with approval the findings in both Dudek and Steele noting that in each case the entire building had been closed off for

renovations. This closure caused this Court to conclude that the building was clearly not open for use by members of the public.

Similarly, this Court adopted the holding in the Taylor decision. The fact that the electrical substation had been locked and the window bricked in clearly established that the building was not open for use by members of the public.

In Kerbersky, this Court adopted with approval the finding in Griffin. This Court stated:

> "An injury within a private residence surely does not come within the statute. A tenant who is present in a city owned apartment as the result of an oral or written lease is not using the building as a member of the public; rather, such a person has a contractual possessory interest in the apartment."

At 535. The contractual possessory interest of the occupants of Betsy Barbour is similar to the contractual possessory interest of the city owned apartment building in Griffin. Consequently, a similar conclusion with respect to the residence hall is appropriate.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellant respectfully requests that this Honorable Court reverse the decision of the Court of Appeals dated January 11, 2002 and hold that the Betsy Barbour Residence Hall is not a building "open for use by members of the public" within the meaning of MCLA 691.1406; MSA 3.996(106).

Respectfully submitted,

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